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Page: 1/7

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**UNITED STATES – ANTI-DUMPING AND COUNTERVAILING DUTIES ON CERTAIN
PRODUCTS AND THE USE OF FACTS AVAILABLE**

REQUEST FOR CONSULTATIONS BY THE REPUBLIC OF KOREA

The following communication, dated 14 February 2018, from the delegation of the Republic of Korea to the delegation of the United States and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

1. Upon instructions from my authorities, and on behalf of the Government of the Republic of Korea ("Korea"), I hereby request consultations with the Government of the United States of America ("United States") pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Articles 17.2 and 17.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement"), and Article 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), regarding (a) certain anti-dumping and countervailing duty measures imposed on products from Korea; (b) certain provisions of United States' legislation regarding the use of facts available; and (c) the United States' ongoing conduct as well as its practice of using adverse facts available as a rule or norm of general and prospective application in anti-dumping and countervailing duty investigations and reviews.

2. These measures appear to be inconsistent with the United States' obligations under certain provisions of the GATT 1994, the Anti-Dumping Agreement, the SCM Agreement, and the Marrakesh Agreement establishing the WTO.

3. In the following sections, Korea identifies the specific measures at issue and indicates the legal basis for its complaint.

I. IDENTIFICATION OF THE MEASURES

4. For purposes of this request for consultations, the measures at issue include, but are not limited to, the following three sets of measures.

A. Certain Definitive Anti-Dumping and Countervailing Duty Measures

5. This request concerns the definitive anti-dumping and countervailing duty measures imposed by the United States pursuant to the preliminary and final anti-dumping and countervailing duty determinations and orders issued by the U.S. Department of Commerce ("USDOC") in the investigations and administrative reviews listed below. The measures include the conduct of those investigations, any preliminary or final anti-dumping and countervailing duty determinations issued in those investigations, any definitive anti-dumping and countervailing duties imposed as a result of those investigations, as well as any notices, annexes, decision memoranda, orders, amendments, or other instruments issued by the United States in connection with these anti-dumping and countervailing duty measures:

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- ***Anti-Dumping Duties on Certain Corrosion-Resistant Steel Products From the Republic of Korea (USDOC investigation number A-580-878) ("Corrosion-Resistant Steel AD Measure") as set forth, among others, in:***
 - Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, 81 Fed. Reg. 35303 (2 June 2016);
 - Issues and Decision Memorandum for the Final Affirmative Determination in the Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea (24 May 2016);
 - Antidumping Duty Order, 81 Fed. Reg. 48390 (25 July 2016).
 - ***Anti-Dumping Duties on Certain Cold-Rolled Steel Flat Products From the Republic of Korea (USDOC investigation number A-580-881) ("Cold-Rolled Steel AD Measure") as set forth, among others, in:***
 - Final Determination of Sales at Less Than Fair Value, 81 Fed. Reg. 49953 (29 July 2016);
 - Issues and Decision Memorandum for the Final Affirmative Determination in the Antidumping Duty Investigation of Certain Cold-Rolled Steel Products from the Republic of Korea (20 July 2016);
 - Antidumping Duty Order, 81 Fed. Reg. 64432 (20 September 2016).
 - ***Countervailing Duties on Certain Cold-Rolled Steel Flat Products From the Republic of Korea (USDOC investigation number C-580-882) ("Cold-Rolled Steel CVD Measure") as set forth, among others, in:***
 - Final Affirmative Determination, 81 Fed. Reg. 49943 (29 July 2016);
 - Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea (20 July 2016);
 - Countervailing Duty Order, 81 Fed. Reg. 64436 (20 September 2016).
 - ***Anti-Dumping Duties on Certain Hot-Rolled Steel Flat Products From the Republic of Korea (USDOC investigation number A-580-883) ("Hot-Rolled Steel AD Measure") as set forth, among others, in:***
 - Final Determination of Sales at Less Than Fair Value, 81 Fed. Reg. 53419 (12 August 2016);
 - Issues and Decision Memorandum for the Final Affirmative Determination in the Antidumping Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea (4 August 2016);
 - Antidumping Duty Order, 81 Fed. Reg. 67962 (3 October 2016).
 - ***Countervailing Duties on Certain Hot-Rolled Steel Flat Products From the Republic of Korea (USDOC investigation number C-580-884) ("Hot-Rolled Steel CVD Measure") as set forth, among others, in:***
 - Final Affirmative Determination, 81 Fed. Reg. 53439 (12 August 2016);
 - Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea (4 August 2016);
 - Countervailing Duty Order, 81 Fed. Reg. 67960 (3 October 2016).
 - ***Anti-Dumping Duties on Large Power Transformers From the Republic of Korea (USDOC investigation number A-580-867) ("Large Power Transformers AD Measure") as set forth, among others, in:***
 - Final Determination of Sales at Less Than Fair Value, 77 Fed. Reg. 40857 (11 July 2012);

- Antidumping Duty Order, 77 Fed. Reg. 53177 (31 August 2012);
- Review determinations and related measures, including:
 - Final Results of Redetermination Pursuant to Court Remand, ABB INC. v. United States, Consol. Court No. 16-00054, Slip Op. 17-138 (7 February 2018).
 - Final Results of Antidumping Duty Administrative Review; 2014-2015 (82 Fed. Reg. 13432, 13 March 2017, third administrative review)
 - the Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea; 2014-2015 (6 March 2017)
 - Preliminary Results of Antidumping Duty Administrative Review: 2015-2016 (82 Fed. Reg. 42289, 7 September 2017, fourth administrative review)
 - the Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Large Power Transformers from the Republic of Korea; 2015-2016 (31 August 2017)
 - Final Results of the Expedited First Sunset Review of the Antidumping Duty Order, 82 Fed. Reg. 51604 (7 November 2017):
 - Issues and Decision Memorandum for the Expedited First Sunset Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea (31 October 2017).

6. This request also concerns any modification, review, replacement or amendment to the definitive anti-dumping and countervailing duty measures listed above and any closely connected, subsequent measures to determine a dumping margin or subsidy amount, or related anti-dumping duty or countervailing duty rates.

B. *Section 776 of the Tariff Act of 1930 (19 U.S.C. § 1677e) as amended by Section 502 of the Trade Preferences Extension Act of 2015, and its implementing regulations*

7. This request also concerns a number of provisions of U.S. law relating to the use of facts available and the drawing of adverse inferences in certain situations by the USDOC under national legislation including:

- Section 502 of the Trade Preferences Extension Act of 2015, Pub. L. No. 114-27;
- Section 776 of the Tariff Act of 1930, codified at 19 U.S.C. § 1677e;
- The implementing regulations of the USDOC in 19 C.F.R. § 351, including in particular section 308; and
- Any other related, subsequent measures that enable or implement the use of facts available in anti-dumping and countervailing duty investigations, administrative reviews and other parts of such proceedings.

C. *Use of Adverse Facts Available As Ongoing Conduct or a Rule or Norm of General Application*

8. This request also concerns the ongoing conduct or the practice of the USDOC of using "adverse facts available" as a rule or norm of general and prospective application when a producer or exporter is found to have failed to cooperate by not acting to the best of its ability. Under this ongoing conduct or norm, whenever the USDOC makes a finding that a producer or exporter has failed to cooperate to the best of its ability, it adopts adverse inferences and, in determining the duty rate for this producer or exporter, selects facts from the record that are adverse to the

interests of this producer or exporter without establishing that such inferences can reasonably be drawn and that such facts are the "best information available" in the particular circumstances¹.

II. LEGAL BASIS

9. Korea is concerned that the measures identified above are inconsistent with the WTO obligations of the United States, including, among others, under Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement.

10. The failure of the United States to comply with its obligations relating to the use of facts available when making preliminary and/or final determinations of dumping and/or subsidization has a direct consequential effect on other aspects of the investigation or review that relate to the determination of dumping or subsidization, the determination of injury by dumped or subsidized imports, the imposition and maintenance of anti-dumping or countervailing duties, and the level of such duties.

11. In addition, Korea is concerned that in the specific investigations and reviews leading to the adoption and maintenance of the above listed anti-dumping and countervailing duty measures, the United States failed to comply with a number of procedural and substantive obligations under the Anti-Dumping Agreement and the SCM Agreement, as identified below.

A. *As Applied Challenge to Certain Definitive Anti-Dumping and Countervailing Duty Measures*

12. With respect to the anti-dumping and countervailing duty measures listed in section I.A of this request, it appears that the USDOC did not assess the facts properly and objectively in finding that the affected Korean producers and exporters failed to act to the best of their abilities and to cooperate in providing information necessary to determine a margin of dumping or an amount of subsidization. Therefore there appears not to have been a valid basis for resorting to the use of facts available in the way the USDOC did.

13. Furthermore, when resorting to the use of facts available, the USDOC resorted to the drawing of "adverse" inferences and failed to take into account all substantiated facts on the record and all evidence that was verifiable and appropriately submitted in a timely manner. In each of these measures, the USDOC based the determination of dumping for the relevant producers or exporters on assumptions or speculation with a view to arriving at a result that was adverse to the interests of these producers or exporters rather than seeking to replace missing information with the best information available, disregarding among others information that was submitted by the Korean producers or exporters to the best of their ability. The USDOC's determinations in the investigations and reviews that led to the adoption or continuation of these measures did not reflect a valid process of reasoning and evaluation. Korea is concerned that when determining dumping and subsidization on the basis of facts available in the context of the above-listed measures, the USDOC used facts available in a punitive manner.

14. Korea therefore considers that the USDOC appears to have acted in violation of the United States' obligations under Article 6.8 and Annex II of the Anti-Dumping Agreement, in particular paragraphs 1, 3, 5, 6 and 7 of Annex II and Article 12.7 of the SCM Agreement relating to the use of facts available.

15. Moreover, as a result of the undue use of facts available when determining dumping and/or subsidization, these measures appear to be inconsistent with several provisions of the Anti-Dumping Agreement and the SCM Agreement relating to the determination of dumping or subsidization, the determination of injury and causation, the determination of the amount of the

¹ The use of adverse facts available has been consistently applied by the USDOC and is undertaken pursuant to:

- Section 502 of the Trade Preferences Extension Act of 2015, Pub. L. No. 114-27;
- Section 776 of the Tariff Act of 1930, codified at 19 U.S.C. § 1677e;
- The implementing regulations of the USDOC in 19 C.F.R. § 351, including in particular section

308.

It is also evidenced, for example, by the manner in which facts available was used in the measures identified in Section I.A of this Request.

duty to be imposed, and the maintenance of the duty, such as Articles 1, 2.1, 2.2, 2.3, 2.4, 3.1, 3.2, 3.4, 3.5, 5.8, 9.2, 9.3, 9.4, 9.5, 11.1, 11.3, 11.4, and 18.1 of the Anti-Dumping Agreement as well as Articles 1, 10, 11.2, 11.3, 11.9, 14, 15.1, 15.2, 15.4, 15.5, 19.1, 19.3, 19.4, 21.1, 21.3, and 32.1 of the SCM Agreement, and Articles VI:1, VI:2 and VI:3 of the GATT 1994.

16. Furthermore, Korea is concerned that when resorting to the use of facts available in the context of these anti-dumping and countervailing duty measures, the United States failed to comply with at least the following provisions, among others:

- a. Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement because the USDOC failed to give notice of the information which it required and to give ample opportunity for interested parties to present in writing all evidence which they considered relevant in the investigation;
- b. Article 6.2 of the Anti-Dumping Agreement and Article 12.2 of the SCM Agreement because the USDOC failed to provide interested parties with the full opportunity to defend their interests;
- c. Article 6.6 of the Anti-Dumping Agreement and Article 12.5 of the SCM Agreement because the USDOC failed to satisfy itself as to the accuracy of the information supplied by interested parties upon which its findings were based;
- d. Article 6.7 and Annex I of the Anti-Dumping Agreement and Article 12.6 and Annex VI of the SCM Agreement because the USDOC failed to verify information provided or to obtain further details and failed to make available the results of verifications to the firms to which they pertain or provide disclosure thereof;
- e. Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement because the USDOC failed to inform all interested parties of the essential facts under consideration which formed the basis for the decision to apply definitive measures;
- f. Article 6.10 of the Anti-Dumping Agreement because the USDOC failed to properly determine an individual margin of dumping for each known producer or exporter;
- g. Article 9.4 of the Anti-Dumping Agreement because in situations where sampling was used² the USDOC determined an all others rate that did not disregard margins established under the circumstances of Article 6.8;
- h. Articles 11.2, 11.3 and 11.6 of the SCM Agreement because the USDOC requests information to be provided on "any other forms of assistance" that is not included in the application on which the investigation is based, and applies facts available whenever it discovers information that was not provided in response to this request, without examining whether the information obtained or discovered suffices to initiate the investigation; and
- i. Article 11.4 of the Anti-Dumping Agreement and 21.4 of the SCM Agreement because the USDOC failed to act in accordance with the provisions on evidence and procedure as outlined above in the relevant reviews.

17. The above-listed violations affect all of the specific anti-dumping and countervailing duty measures that were referred to in section I.A of this request.

B. As Such Challenge to Section 776 of the Tariff Act of 1930 (19 U.S.C. § 1677e) as amended by Section 502 of the Trade Preferences Extension Act of 2015, and its implementing regulations

18. With regard to Section 776 of the Tariff Act of 1930 (19 U.S.C. § 1677e) as amended by Section 502 of the Trade Preferences Extension Act of 2015, and the above-listed related legal provisions of the United States' national legislation governing the use of facts available, Korea is

² This was the case for example in the fourth administrative review in Large Power Transformers AD Measure.

concerned that these provisions are inconsistent with the United States' obligations under Article 6.8 and Annex II of the Anti-Dumping Agreement, and Article 12.7 of the SCM Agreement.

19. Section 502 of the Trade Preferences Extension Act of 2015 amending Section 776 of the Tariff Act of 1930 (19 U.S.C. § 1677e) provides that if the authorities find that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, the authorities may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. In particular, it provides that the authorities are not required to determine, or make any adjustments to, a countervailable subsidy rate or weighted average dumping margin based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information. Section 502 gives full discretion to the authorities to apply the highest rate or margin available from among the available dumping margins or countervailable subsidy rates, without the need to corroborate such margins and provides that the authorities are not required to estimate what the countervailable subsidy rate or dumping margin would have been if the interested party found to have failed to cooperate had cooperated or to demonstrate that the countervailable subsidy rate or dumping margin used by the administering authority reflects an alleged commercial reality of the interested party.

20. Korea considers that these legal provisions unduly permit the United States' investigating authorities, and in particular the USDOC, not only to replace the missing necessary information but to disregard verifiable and relevant information that was appropriately submitted by the producers or exporters. They expressly relieve the authorities from the requirement to use best available information with special circumspection in certain circumstances and give full discretion to the authorities to deliberately apply the highest rate, without the need to even consider whether this rate has a basis in the commercial reality of the producer or exporter in question, or is supported by available other information that relates to the producer or exporter in question. These provisions thus provide that there is no obligation on the authorities to abide by the obligations on the use of facts available imposed by Article 6.8 and, among others, paragraphs 1, 3, 5, 6 and 7 of Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement. These provisions unduly relieve the obligation on the investigating authorities to use facts available that reasonably replace missing "necessary information" with a view to arriving at an accurate determination.

21. In addition, Korea considers that the unfettered discretion granted to the authorities to act in this manner is inconsistent with the United States' obligation under Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the SCM Agreement, as well as Article XVI:4 of the Marrakesh Agreement establishing the WTO to ensure conformity of its laws regulations and administrative procedures with the provisions of, in particular, Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement.

C. *As Such Challenge to the USDOC's Use of Adverse Facts Available As an Ongoing Conduct or Rule or Norm of General Application*

22. Finally, with regard to the USDOC's use of adverse facts available Korea is concerned that, under this ongoing conduct or norm, the USDOC selects facts from the record that are adverse to the interests of foreign producers or exporters without establishing that the adverse inferences can reasonably be drawn and that such facts are the "best information available" in the particular circumstances. Korea considers that this USDOC ongoing conduct or norm appears to be inconsistent with the United States' obligations relating to the use of facts available, because, among other things, the United States disregards verifiable and relevant information that was appropriately submitted by the producers or exporters and fails to act with special circumspection when basing its findings on information from secondary sources, thus failing to use the "best information available".

23. Korea considers that the USDOC's ongoing conduct or norm of using adverse facts available whenever it makes a finding of a failure to cooperate is inconsistent with the obligation that investigating authorities undertake a process of reasoning and evaluation when selecting the facts available that reasonably replace the missing "necessary information" to arrive at an accurate determination and thus appears to violate Article 6.8 and Annex II of the Anti-Dumping Agreement, in particular paragraphs 1, 3, 5, 6 and 7 of Annex II and Article 12.7 of the SCM Agreement.

III. CONCLUSION

24. In sum, Korea is concerned that the above-listed anti-dumping and countervailing duty measures, as well as the legal provisions and the ongoing conduct or rule of general and prospective application identified above, appear to be inconsistent with the relevant obligations of the United States under the GATT 1994, the Anti-Dumping Agreement, the SCM Agreement as well as the Marrakesh Agreement establishing the WTO.

25. The United States' measures appear to nullify or impair the benefits accruing to Korea directly or indirectly under the cited agreements.

26. Korea reserves the right to raise additional factual and legal issues, and to address additional measures and claims regarding the above matters, in the course of the consultations and in any request for the establishment of a panel.

27. Korea looks forward to receiving the United States' reply to this request and to fixing a mutually acceptable date for consultations.
